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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 177

HARRY I. SCHWIMMER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 178

HARRY I. SCHWIMMER, PETITIONER

v.

UNITED STATES OF AMERICA, WYLLYS NEWCOMB, HARRY RICHARDS AND OMAR SCHNATMEIER

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions of the Court of Appeals (Pet. I, 9–26; Pet. II, 9–12) have not yet been reported.[1]

[1] The two proceedings in which petitioner seeks review are so interrelated that we treat them together in this brief in opposition. The petition and record in No. 177, are designated Pet. I and R. I respectively. The petition and record in No. 178 are designated Pet. II and R. II respectively.

JURISDICTION

The judgments of the Court of Appeals were entered on April 23, 1956 (Pet. I, 26-27; Pet. II, 13). Petitions for rehearing were denied on May 21, 1956. The petitions for writs of certiorari were filed on June 19, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

In No. 178:

1. Whether the District Court properly dismissed a complaint for an injunction to prevent the grand jury from considering certain records, where an indictment had been returned before the application was heard and the issues as to the admissibility of the records were therefore left for determination at the trial.

In No. 177:

2. Whether the denial of a motion to quash a subpoena and for the return of records produced by a third-party agent of the movant should be reviewed where an indictment was subsequently returned against the movant but trial was suspended as to the movant because of his illness.

3. Whether an attorney who moves to quash a subpoena directed to a third-party with whom his records have been stored must claim the privilege against self-incrimination if he wishes to rely thereon.

4. Whether there was sufficient proof before the District Court that the clients had waived the attorney-client privilege.

STATEMENT

Petitioner, an attorney who formerly practiced law in Missouri, changed his residence and stored his file cabinets and boxes of records on the premises of the Dean Rubber Manufacturing Company of Kansas City, Missouri (R. I, 9). A grand jury of the Eastern District of Missouri, which was investigating the possible existence of a conspiracy to defraud the United States of the proper services of its employees in certain tax cases (R. I, 20), served upon the Dean Company on October 18, 1955, a subpoena calling for all of petitioner's records (R. I, 1); and on October 21, 1955, another subpoena calling for production of such of the records as related to the representation by petitioner of Irving Sachs, Shu-Stiles, Inc., and Mrs. Laura Taylor for the period from September 1, 1945, to the date of the subpoena, together with records for the same period reflecting the receipts and disbursements by petitioner (R. I, 2–3).

On October 25, 1955, petitioner filed separate motions in the District Court to quash the subpoenas and for return of the property (R. I, 4–8), the Dean Company having on October 25 delivered to the United States Marshal all of petitioner's records in its possession (R. I 11).[2] The grounds of the motion were that the subpoenas were so broad in scope as to constitute an unreasonable search and seizure, and that examination of the documents would violate the attorney-client privilege (R. I, 4–8). No issue

[2] The records were held by the Marshal and not examined pending a ruling by the District Court (R. I, 11).

was raised as to the privilege against self-incrimination.

At the hearing on the motions, counsel for the government stated that the "Grand Jury is investigating among other things Mr. Schwimmer's role and conduct in the so-called Sachs case" (R. I, 20). With permission of the court, he read a portion of the transcript of the testimony of Mr. Sachs before the grand jury in which Mr. Sachs stated that he waived the attorney-client privilege (R. I, 21–22). Government counsel also stated that he had communicated with an attorney in St. Louis who stated that he was the attorney for Mr. Sachs, and that both Mr. Sachs and Shu-Stiles waived their privilege (R. I, 23). Government counsel stated that the attorney in question had already turned over to the grand jury his own files and that a Kansas City attorney had done the same (R. I, 23, 25). Government counsel offered to put his statements in affidavit form, but petitioner's counsel said that was unnecessary, although he did object that the testimony as to what other counsel had said was hearsay (R. I, 23–25). As to Mrs. Taylor, government counsel stated that she had told him and had testified before the grand jury that petitioner was never her attorney (R. I, 29).

The District Court denied, as to both subpoenas, the motions to quash and for the return of the property (R. I, 34–35). In its order it provided for the appointment of a special master to examine the documents in order to determine which of those relating to clients other than Sachs, Shu-Stiles, Inc., and Mrs.

Laura Taylor (all of whom were found to have waived their attorney-client privilege) were subject to the attorney-client privilege. The documents found to be so privileged were to be impounded until further order of the court; the unprivileged ones were to be turned over to the grand jury.

After denial of his motions, petitioner applied to the Court of Appeals for a stay pending appeal which would restrain the United States from using the records in any way before the grand jury. The Court of Appeals granted a stay as to the first, the general, subpoena, but denied a stay as to the second (see Pet. I, 12).

On November 30, 1955, after denial in part of his motion for a stay, petitioner filed in the District Court a complaint seeking an injunction restraining the attorneys for the government from using before the grand jury any records produced by the Dean Rubber Company (R. II, 1–9).[3] In his complaint, in addition to the grounds previously set forth, he alleged that use of the documents would violate his privilege against self-incrimination (R. II, 5). He also sought to enjoin use of other documents produced before the grand jury by a third party, an attorney, claiming that he, petitioner, was the client of the third party (R. II, 7–9). The District Court dismissed the complaint on December 2, 1955 (R. II, 10). The day before, on December 1, 1955, the grand

[3] Only those relating to the Sachs, Shu-Stiles, Taylor matter were subject to examination under the order of the Court of Appeals.

jury had returned an indictment charging petitioner and two others with conspiracy to defraud the United States in relation to the Sachs and Shu-Stiles, Inc. prosecution for income tax evasion.

With respect to the appeal of the denial of the motions to quash (No. 177), the Court of Appeals held that petitioner had standing to object, since the documents were his and were merely stored with the Dean Company (Pet. I, 14). It held that the first general subpoena was too broad and should have been quashed (Pet. I, 14–17). Since the Dean Company had, however, before the motion was heard, produced all the records stored with it without attempting to separate those specifically relating to the second subpoena, the court noted that its reversal as to the general subpoena would prevent "any examination being made by the grand jury of such files and records as are beyond the scope of the second subpoena" (Pet. I, 17).

As to the second subpoena, the Court of Appeals held that it was properly limited as to subject matter and time, so as not to constitute an unreasonable search and seizure (Pet. I, 18–19). It ruled that there was sufficient evidence to support the conclusion of the District Court that Shu-Stiles, Inc., Irving Sachs, and Mrs. Taylor had waived the attorney-client privilege (Pet. I, 20–22). The Court of Appeals also held that it was proper for the District Court to have appointed a master to determine preliminarily whether anything in the papers found to be connected with the Shu-Stiles matter (which under the second

subpoena could be turned over to the grand jury) was subject to an attorney-client privilege of some person other than those who were found to have waived the privilege, but that petitioner was entitled to be told what papers had been found to be not privileged and to have a ruling from the court if he claimed that some other client was involved (Pet. I, 22–24).

As to the civil action for injunction (No. 178), the Court of Appeals held that the complaint had properly been dismissed. Its decision on the motions to quash the subpoenas, it noted, governed on the points there raised (Pet. II, 10). On the claim of privilege against self-incrimination, raised for the first time in the injunction complaint, the court ruled that the assertion of the claim came too late in relation to use of the documents before the grand jury where petitioner chose not to assert it in his motions to quash, particularly since the papers had already been before the grand jury prior to the time the civil action came before the court (Pet. II, 10–11). The fact that the grand jury already had seen the documents and had already returned an indictment was, the Court of Appeals found, itself a sufficient basis for denial of the injunction (Pet. II, 11). The court specifically noted, however, that its decision was "without any implication on the question of self-incrimination in relation to any trial proceedings under the indictment which has now been returned against Schwimmer" (Pet. II, 11). Similarly, it held that any assertion of the attorney-client priv-

ilege by petitioner as to papers produced by the third-party attorney was "a matter for assertion by him in relation to any attempted use of such files and papers on a trial under the returned indictment" (Pet. II, 11).

After the decision of the Court of Appeals, the government filed in the District Court a motion to permit it to make available for petitioner's inspection the books, records and documents delivered by the master to the grand jury. In connection with the motion, the government listed the papers (about 228 in number) which the master had found to be not subject to the privilege and stated that three of them had been introduced as exhibits before the grand jury. On April 30, 1956, the District Court granted authorization to make such documents available to petitioner for inspection.

On May 7, 1956, the trial of petitioner and his two co-defendants commenced in the District Court, a stay pending determination of the petitions for certiorari in the instant proceedings having been denied by the District Court, the Court of Appeals, and the Chief Justice of the United States. Petitioner had a heart attack, and the trial was severed as to him on May 28, 1956. Records which had been taken from the subpoenaed files were not finally introduced in evidence until petitioner's case had been severed.

ARGUMENT

1. As to No. 178, the civil injunction action brought against government counsel individually, the cause in its present posture presents no issue which is ripe

for review. As the Court of Appeals pointed out in its opinion, the indictment against the petitioner had been returned the day before the motion to dismiss the complaint came before the District Court. The grand jury had already considered the evidence which was the subject matter of the suit. Insofar as the action sought to enjoin government counsel from turning evidence over to the grand jury, it requested relief which the court was powerless to grant. An action for injunction becomes moot where the act sought to be enjoined has already occurred. *Chandler* v. *Wise*, 307 U.S. 474, 477–478; *Brownlow* v. *Schwartz*, 261 U.S. 216, 217–218; *Jones* v. *Montague*, 194 U.S. 147. Since mootness had occurred before the application was heard, the District Court properly dismissed the complaint.[4]

Thus, there is no occasion at this time to reach the question which petitioner attempts to pose in this proceeding, *i. e.*, whether after having (as we show *infra*) deliberately failed to raise the issue of the privilege of self-incrimination when the documents were first subpoenaed, he may subsequently assert the privilege in relation to such documents. The matter of the privilege was not raised before the documents had been considered by the grand jury. Whether it can be raised later is an issue to be determined when and if petitioner is tried under the indictment.

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[4] In *Perlman* v. *United States*, 247 U. S. 7, relied upon by petitioner, the action was brought before consideration of the documents by the grand jury.

2. As to No. 177, the proceeding to quash the subpoena, while it may not be technically moot,[5] the issues raised are, as to petitioner, in large measure academic since they will assume significance only if he becomes well enough to stand trial. If that should happen, a ruling on the admissibility of the evidence can be obtained at the trial and reviewed on appeal if petitioner is convicted. There is no reason for this Court to review the matter at this intermediate stage.

3. In any event, the challenge to the validity of the subpoena is without merit. Petitioner does not here challenge the ruling of the Court of Appeals that the narrow subpoena, which was limited and definite as to subject matter and time, was a reasonable one, and that ruling was clearly correct. See *Brown* v. *United States*, 276 U. S. 134; *Wheeler* v. *United States*, 226 U. S. 478; *Consolidated Rendering Company* v. *Vermont*, 207 U. S. 542; *Shotkin* v. *Nelson*, 146 F. 2d 402 (C. A. 10); *Consolidated Mines* v. *Securities and Exchange Commission*, 97 F. 2d 704 (C. A. 9).

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[5] Ordinarily, a motion to quash a grand jury subpoena is not an appealable order. *Cobbledick* v. *United States*, 309 U. S. 323. This case, however, was in a somewhat different posture since the subpoena was directed to the custodian of the property who produced the documents before the court, and petitioner sought to have the property returned to him as his. Under these circumstances, the motion could properly be treated as one for the return of property before indictment, a separate action which does lie. *Perlman* v. *United States*, 247 U. S. 7.

By the time the cause was before the Court of Appeals on appeal, an indictment had been returned against petitioner. The Courts of Appeals are divided as to whether a motion to suppress and for the return of property made before indictment, but decided or appealed after indictment has been returned, merges into the

Petitioner's argument is that, since the subpoena called for the production of his private records, it was *ipso facto* invalid, whether or not he chose to claim the privilege of self-incrimination with respect thereto. The privilege, however, is a personal right which may be waived and is waived by failure to assert it at the first opportunity. *Rogers* v. *United States*, 340 U. S. 367, 370–371; *United States* v. *Monia*, 317 U. S. 424, 427; *United States* v. *Murdock*, 284 U. S. 141, 148; *Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, 112–113. A person who testifies without claiming the privilege is in no position to assert that his testimony was compelled. So one who allows records to go before the grand jury without raising the privilege cannot assert that the production of the records was compelled.

In this case, petitioner could have claimed the privilege with respect to the records in his motion to quash. Although the subpoena was directed to a third party, petitioner's motion was made before the records had been turned over to the ground jury, and his standing to contest the subpoena has been upheld. Had he raised the issue of privilege and had his claim

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criminal case so as to be reviewable only after conviction. Cf. *Lapides* v. *United States*, 215 F. 2d 253 (C. A. 2); *In re Sana Laboratories*, 115 F. 2d 717 (C. A. 3), certiorari denied, 312 U. S. 688; *Dowling* v. *Collins*, 10 F. 2d 62 (C. A. 6), certiorari denied, 270 U. S. 660 (holding that it remains an independent proceeding) with *United States* v. *Mattingly*, 285 Fed. 922 (C. A. D. C.), reaffirmed in *Nelson* v. *United States*, 208 F. 2d 505, 516–517 (C. A. D. C.), and *United States* v. *Williams*, 227 F. 2d 149 (C. A. 4) (holding that it merges in the criminal action). In the Court of Appeals, the Government did not contest appealability.

been overruled, he would have been in a position to argue compulsion. But there is no compulsion involved in petitioner's own deliberate act of refraining from asserting the privilege. The case is thus materially different from *Boyd* v. *United States,* 116 U. S. 616, where the compulsion lay in the fact that failure to produce documents was, under the particular statute there involved, a confession of their character as described in the complaint.

The argument, made by petitioner in No. 178 (Pet. II, 5–7), but pertinent to No. 177 as well, that the waiver of the privilege was not knowingly and consciously made because he had forgotten the contents of the records is a curious one. By the same token, oral testimony voluntarily given becomes involuntary if it turns out to be more damaging than the testifier had thought it to be. Petitioner is an attorney, who obviously knew of his right to claim the privilege. He does not claim that, before the motion to quash, he was unaware of the possibility that his conduct in the Sachs matter was the subject of investigation; in the petition for certiorari in No. 178, it is stated (Pet. II, 7) that "not until after petitioner's motions were filed did Government counsel *specifically* inform petitioner that he was himself under investigation" (emphasis added).[6] Yet, not only did he fail to assert the privilege in the motion to quash, but, on the hearing of that motion, after government counsel had

[6] At the trial under the indictment, there was testimony by a representative of the Dean Company that petitioner had examined the stored records after the subpoena had been served but before the return date.

expressly stated that petitioner's conduct was under investigation, no claim of privilege was tendered. Indeed, the government's brief in the Court of Appeals states that, at the argument in the Court of Appeals on application for a stay after the motion to quash the subpoena had been denied by the District Court, petitioner's counsel specifically disclaimed reliance on the privilege.

In short, when the subpoena was first served, petitioner chose for his own reasons not to rely on the privilege. Subsequently, after the indictment was returned, he changed his mind. Whatever may be the effect of that subsequent change of heart, it furnishes no basis for quashing a proper subpoena seeking records as to which the privilege was not claimed.

4. The factual issue as to whether the District Court had before it sufficient evidence to show that Sachs, Shu-Stiles, Inc., and Laura Taylor had waived the attorney-client privilege presents no question for review here. It is evident that petitioner is seeking to take advantage of a privilege which is not his. None of the clients involved has before or since claimed a breach of privilege.

As to Sachs, the record is clear that he specifically waived the privilege before the grand jury. With respect to Shu-Stiles, Inc., while the relationship between Sachs and the corporation was not developed at the hearing, it seems evident that Sachs could speak for the corporation as well. In addition, there was the statement of government counsel, not merely as to what the attorney for the corporation had told him

about the waiver of privilege, but to the actual fact that the records of two attorneys for Shu-Stiles had been turned over to the government. As to Mrs. Taylor, although her statement before the grand jury was not read, there was the declaration of government counsel (petitioner's counsel having previously said that he did not doubt the word of government counsel) that she had testified that petitioner was not her attorney (see the Statement, *supra,* p. 4).

This Court held in *Blackburn* v. *Crawfords,* 3 Wall. 175, 194, that "The client may waive the protection of the rule. The waiver may be express or implied." The District Court had before it ample evidence justifying the conclusion that petitioner had no privilege with relation to the clients here involved.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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JULY 1956.

U. S. GOVERNMENT PRINTING OFFICE: 1956

FILED
SEP 7 1956
JOHN T. FEY, Clerk

IN THE

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OCTOBER TERM, 1956.

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On Petitions for Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR PETITIONER.

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CITATIONS.

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On Petitions for Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR PETITIONER.

ARGUMENT.

1. Respondents in their brief repeatedly take the position that petitioner in his original motions to quash the subpoenae raised no issue as to the privilege against self-incrimination, and that he is thereby precluded from attacking the denial of his motions to quash on that basis.

Respondents do not dispute, however, and apparently make no attempt to answer the fact that in his motions to quash the subpoenae duces tecum the petitioner specifically asserted all of the rights and privileges to which he was entitled under the Fourth Amendment to the Constitution of the United States (R. I, 4-7). Petitioner, by asserting his privileges under the Fourth Amendment, was specifically objecting to the involuntary seizure and compulsory use of his own private books and records in a criminal proceeding, to-wit, the Grand Jury investigation into his affairs. Even the so-called narrow subpoena, which is the one sustained by the Court of Appeals, commanded the production of all of petitioner's personal records in his practice of law for over a ten-year period (R. I, 2-3).

The Government's position apparently is that it may compel the production in a criminal investigation of the private books and records of the person against whom the investigation is directed and for use in such investigation, notwithstanding the constitutional guaranties of the Fourth Amendment were asserted at the first opportunity. Such a position would, it seems, be directly contrary to the language of this Court in the case of **Boyd v. United States**, 116 U. S. 616, 622, wherein it was held:

> "It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him or to forfeit his property is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient and effects the sole object and purpose of search and seizure."

That decision held also that constitutional provisions for the security of person and property should be liberally construed, for otherwise illegitimate and unconstitutional

practices obtain a firm foothold, which cannot easily be eradicated (116 U. S., at 635).

If, as indicated in the Boyd case, the seizure of a man's private books and papers to be used in a criminal proceeding against him is not substantially different from compelling him to be a witness against himself, and if the compulsory production of his books and records compels him to be a witness against himself within the meaning of the Fifth Amendment and is the equivalent of an unreasonable search and seizure within the meaning of the Fourth Amendment, surely it is not a liberal or fair construction of the constitutional privilege to contend that petitioner could not attack the original subpoenae on the basis of self-incrimination, because the words "Fifth Amendment" or the words "self-incrimination" did not formally appear in his motions.

With regard to the narrower subpoena it is not correct, as respondents contend, that petitioner does not challenge the ruling of the Court of Appeals that the subpoena was properly limited as to subject matter. For the very basis of petitioner's contention is that the subject matter of the subpoena, namely, his own records were not such as could be properly subpoenaed in such a proceeding.

The cases cited by respondents in support of its proposition that one who testified without claiming the self-incrimination privilege cannot assert that his testimony was compelled, are not applicable or controlling here. Thus in the case of **Rogers v. United States**, 340 U. S. 367, the situation was one where a party appearing before a Grand Jury had freely answered incriminating questions relative to her connection with the Communist party. Having done so, the Court held that she was required to give details as to her answers and could not later claim the privilege against self-incrimination as to such details. Certainly such a situation is a far cry from the instant one, where

at the first opportunity petitioner attacked the subpoenae and sought to quash the same on the basis of stated constitutional guaranties.

Similarly, in the case of **United States v. Monia**, 317 U. S. 424, the Court was concerned there with whether one summoned to testify before a Grand Jury inquiring into an alleged violation of the Sherman Act obtains immunity from prosecution for such an offense though he does not claim his privilege against self-incrimination. The Court held that although one must ordinarily claim the privilege in order to be afforded its protection, nevertheless the plain language of the Sherman Act granted immunity notwithstanding the failure to claim the privilege against self-incrimination. In the case of **United States v. Murdock**, 284 U. S. 141, one subpoenaed to give information to Internal Revenue agents relative to his federal income tax return refused to answer the questions put to him on the ground that he might thereby incriminate himself under state law. The defendant there specifically stated that he was not urging self-incrimination under federal law. Under such circumstances the witness was logically held affirmatively to have waived the privilege against self-incrimination under the United States Constitution, and thereby he could not later assert it in attacking an indictment based on his refusal to supply such information.

And finally, in the case of **United States ex rel. Vajtauer v. Commissioner of Immigration**, 273 U. S. 103, one against whom deportation proceedings were instituted merely stated, when called upon to testify, that he would not answer any questions until the evidence upon which the warrant was based would be presented. He continued to stand mute after all of the Government's case was presented. After his order of deportation, he filed a writ of habeas corpus in which he alleged that answers to questions put to him at the hearing would have tended to incriminate him under Illinois State law. This Court, in

affirming the dismissal of the habeas corpus petition, held that aside from the questionable nature of the claim of self-incrimination under State law, his failure to assert any privilege at the time of the refusal to answer the questions barred his claiming the privilege of self-incrimination at a later time.

Petitioner believes that the case at bar presents a far different situation for the reason that the unlawfulness of the seizure of his records and private papers was specifically raised by petitioner on the basis of the violation of his constitutional privileges under the Fourth Amendment, and this contention was asserted at the very inception of the proceedings below. Since this Court has held that unreasonable searches and seiures are almost always made in order to compel an individual to give evidence against himself and that compelling one to be a witness against himself is equivalent to an unreasonable search and seizure, petitioner reasserts that the question of the self-incriminatory nature of the subpoenae in question are before this Court for review.

2. Respondents state in their brief (p. 10) that the issues raised by petitioner are largely academic and will assume significance only if petitioner becomes well enough to stand trial. It is further stated in said brief (p. 9) that since the Grand Jury had already considered the evidence which was the subject matter of the injunction suit (No. 178), that issue is also moot. These contentions, it seems to petitioner, are completely without merit, and should not prevent this Court from reviewing the important questions of law here involved. The forced performance of acts does not render a case moot when the consequences of the performance may be set aside if the injunction is granted at some future time. **Porter v. Lee**, 328 U. S. 246, 251; **Mills v. Green**, 159 U. S. 651, 654. In the case now before the Court the question of whether the Grand Jury properly

received the items of petitioner's personal books and records, which records were used against him in the procurement of the indictment, may well have some bearing on the validity of the subsequently returned indictment. Furthermore, petitioner is entitled not to be put to the expense of the preparation for and participation in a trial based on an indictment, if the means used in procuring the indictment be subject to the criticism of which plaintiff here complains. These matters are therefore neither academic nor moot, but are of great and general importance and should be considered by this Court.

CONCLUSION.

For the reasons set out above, and those set out in the original petitions, the writs of certiorari should be granted.

Respectfully submitted,

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